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No.

In the Supreme Court of the United States

October Term, 1983

TRANS-WORLD SEWING MACHINE CO., INC.,
Petitioner,

vs.

STANDARD SEWING EQUIPMENT CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO COURT OF APPEALS OF KANSAS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the right to orally argue a cause at the conclusion of all the evidence is guaranteed by the Fourteenth Amendment?

2. If the answer is "yes," is the right one that can be trampled by a trial judge's vague reference to memory of private notes of "waiver"?

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JURISDICTION

Judgment adverse to Trans-World was rendered March 24, 1983 by the Court of Appeals of Kansas. Petition for Review to the Supreme Court of Kansas was considered and denied June 3, 1983. Jurisdiction is invoked under provisions of 28 U.S.C. § 1257 (3).

CONSTITUTIONAL PROVISION

Fourteenth Amendment, Sec. 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Trial to a judge was had on Standard's invoice claims for merchandise which Trans-World was resisting because of defects therein.

Through misunderstanding, one Dorfman did not appear at trial and a continuance was had to secure his deposition in New York. Once the deposition was received, however, the judge proceeded to enter Findings of Fact and Conclusions of Law adverse to Trans-World.

The judge had afforded both sides oral opening statements at the beginning of trial, but no opportunity was afforded for final oral argument, the court notifying counsel by letter that he had received the deposition and had proceeded to enter Findings of Fact and Conclusions of Law.

Petitioner Trans-World promptly filed its motion for new trial raising the point that reasonable opportunity for oral argument had not been afforded. The judge overruled the motion, stating by letter: "While the record doesn't reflect one way or another, I am satisfied from my notes that arguments were waived * * *."

Upon the appeal to the Court of Appeals, the court recognized the fundamental right of closing argument but held that the letter by the judge calling upon his memory of secret notes amounted to a waiver of the right. The Kansas Supreme Court denied review.

ARGUMENT

It is submitted that the right to oral closing argument is one of long-standing historically and does indeed have basic constitutional dimensions under Due Process concepts. Amendment 14, Sec. 1.

This Court has recognized the very essence of due process inherent in the right to oral argument. *Pittsburgh, etc. v. Backus,* 154 U.S. 421, 426; *Fallbrack Irrig. Dist. v. Bradley,* 164 U.S. 112; *Londoner v. Denver,* 210 U.S. 373.

Indeed, the inferior court herein granted that the right was fundamental! It runs afoul of the federal Fourteenth-Amendment Standard, however, when it proceeds to hold that waiver occurred "on a silent record."

This Court specifically in ringing terms does not accede to this loose standard, it is submitted:

Mr. Justice Cardozo: "We do not presume acquiescence in the loss of fundamental rights." *Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U.S. 292, 306.

In recent days, members of the present Court have reiterated this same fundamental cast albeit it in criminal cases, it parenthetically being submitted that on such fundamental issues there can be no valid distinction between civil and criminal causes. *Barker v. Wingo,* 407 U.S. 514, quoting from *Carnley v. Cochran,* 369 U.S. 515. The following language from *Carnley,* we submit, capsulates the principles applicable:

> "It has been pointed out * * * we 'do not presume acquiescence in the loss of fundamental rights' (quoting from *Johnson v. Zerbst,* 304 U.S. 488) * * * Presuming waiver from a silent record is impermissible." 369 U.S. 514, 516.

Inasmuch as the Kansas court's approach is patently at odds with the proper high federal standard set forth, the cause should be set down for argument.

Respectfully submitted,

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APPENDIX

NOT DESIGNATED FOR PUBLICATION

No. 54,609

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STANDARD SEWING EQUIPMENT CORPORATION,
Appellee,

v.

TRANS-WORLD SEWING MACHINE COMPANY, INC.,
Appellant.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; JAMES J. LYSAUGHT, JR., judge. Opinion filed March 24, 1983. Affirmed.

Elwyn L. Cady, Jr., of Independence, Missouri, and *John H. Fields*, of Kansas City, for appellant.

James E. Phelan, of Kansas City, for appellee.

Before PARKS, P.J., ABBOTT and REES, JJ.

Per Curiam: This is an appeal by the defendant from an adverse judgment.

Plaintiff argues that defendant's appeal should be dismissed because its notice of appeal failed to name the court to which its appeal was taken as required by K.S.A. 60-2103(b) and Supreme Court Rule No. 2.02 (230 Kan.

xliv). We are satisfied that legislative intent as expressed in K.S.A. 20-3018(a) (see *Atchison County v. Sullivan*, 6 Kan. App. 100, 49 Pac. 677 [1897]) gives us authority to hear defendant's appeal despite its failure to follow this rule.

There is a more serious problem concerning the notice of appeal. This court can and should raise jurisdictional questions on its own. The notice of appeal is signed by an out-of-state attorney who was not admitted to practice in Kansas for the purpose of participating in this case at the district court level and who, in fact, had not participated in the trial of this case. Supreme Court Rule No. 116 (230 Kan. lxxix) provides that "No court, agency or tribunal shall entertain any action, matter, hearing or proceeding while the same is begun, carried on or maintained in violation of the provisions of this rule." This provision was considered by the Kansas Supreme Court in *Bradley v. Sudler*, 172 Kan. 367, 371, 239 P.2d 921 (1952), wherein the Supreme Court held that out-of-state counsel who filed a pleading without complying with the rule left the trial court without jurisdiction to entertain or consider the pleading. The only factual distinction between *Bradley* and the case at hand is that here out-of-state counsel did list local counsel (the attorney who tried the case) on the notice of appeal. He had not, however, been admitted to practice to participate in this case, either in this court or in the trial court, at any time material to the filing of the appeal.

We believe *Bradley v. Sudler* was disapproved (although not by name) in *Thornburg v. McClelland*, 186 Kan. 20, 23, 348 P.2d 617 (1960), and the failure to comply with Rule No. 116 is no longer jurisdictional. Here, as in *Thornburg*, defendant complied with the rule prior to our hearing oral argument, thus we are of the opinion we have jurisdiction to hear and decide this appeal.

The defendant makes two arguments. It first argues it was not afforded an opportunity to make final oral argument. The law in Kansas is that each party has the absolute right to have his cause argued by counsel before the decision is rendered, whether it is tried to the court or a jury. *Collins v. Kansas Milling Co.*, 207 Kan. 617, 620, 485 P.2d 1343 (1971); *Callan v. Biermann*, 194 Kan. 219, Syl. ¶ 1, 398 P.2d 355 (1965); *Farmers Union Central Cooperative Exchange v. Tomson*, 192 Kan. 274, Syl. ¶¶ 1, 2, 387 P.2d 202 (1963); *Richa v. Wichita Precision Tool Co.*, 190 Kan. 138, Syl. ¶ 1, 373 P.2d 201 (1962); *Boucher v. Roberts*, 187 Kan. 675, Syl. ¶ 3, 359 P.2d 830 (1961). The Kansas Supreme Court has not been reluctant to reverse a case solely to provide a party that right. But the Court stated in *Callan*:

> "However, in order to predicate error upon the refusal of the court to allow argument, *it must appear that counsel has not waived the right by silence or acquiesence. The record should affirmatively show that permission to argue was refused.* The approved practice of dealing with trial errors is to make timely objection to them as they arise. Fairness to the court should prompt counsel to call attention to such errors seasonably, and he may be held to waive his right to relief where his conduct, expressions or silence shows acquiescence in an erroneous declaration of law or evinces a purpose to take advantage of unguarded expressions that would have been promptly corrected if pointed out." 194 Kan. at 220-21 (emphasis supplied).

In addition, *Richa* seemed to add the requirement that counsel make a "timely request." Also, see *Browning v. LeFevre*, 191 Kan. 397, 400, 381 P.2d 524 (1963), where the court denied plaintiff's request for reversal based on the trial court's failure to allow oral argument prior to de-

cision, stating: "When the court announced that it was ready to rule counsel remained silent."

The trial transcript is silent as to whether final argument was waived. It shows that both parties rested subject to the defendant taking the deposition of an out-of-state witness. The trial court requested proposed findings of fact and conclusions of law. The deposition was taken and filed with the court as were suggested findings of fact and conclusions of law. The defendant submitted 39 proposed findings of fact (nine and a half pages) and 13 conclusions of law. The trial court entered judgment adverse to defendant. Defendant filed a motion for new trial and, among other complaints, argued that "defendant was not afforded a reasonable opportunity to present his evidence, argue the case and be heard on the merits of the case." The trial judge ruled: "While the record doesn't reflect one way or another, I am satisfied from my notes that arguments were waived when I agreed to continue the case for Mr. Dorfman's deposition and set a deadline for Counsel to file Suggested Findings of Fact and Conclusions of Law." The record contains nothing contrary to the trial judge's ruling and we thus hold that defendant has failed to meet its burden to show reversible error concerning its allegation it was not afforded final oral argument.

Defendant also argues that the plaintiff made a binding admission in its answers to interrogatories, and thus the trial court erred in holding defendant had the burden of proof at trial to prove its claim that it had an oral agreement for an exclusive distributorship in a specified area. Defendant has not included the interrogatories in the record on appeal. Plaintiff sets forth three interrogatories in its brief. We need not decide whether the answers to interrogatories are binding on the party giving them, as the interrogatories set forth in plaintiff's brief would not sup-

port defendant's contention that an exclusive distributorship was established. Two of the interrogatories seem to deny an exclusive distributorship was given and the other lists defendant and one other firm as distributors in the area where defendant claims it had an exclusive distributorship. Defendant has failed to meet its burden of showing trial error.

Affirmed.

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 82-54609-A

Standard Sewing Equipment Corp.,
Appellee,

v.

Trans-World Sewing Machine Co. Inc.,
Appellant.

You are hereby notified of the following action taken in the above entitled case:

Petition for review.

Considered and denied.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date June 3, 1983